

ARE MODERN BLOGGERS FOLLOWING IN THE FOOTSTEPS OF PUBLIUS? (AND OTHER MUSINGS ON BLOGGING BY LEGAL SCHOLARS . . .)

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ABSTRACT

Is legal blogging an antidote to the hyper-scholasticism that sometimes characterizes the legal academy today? Or is it a self-indulgence for legal scholars? It's hard to know. On the one hand, there is a proud American tradition behind the publication of concise but erudite essays aimed at a broad audience concerning the important legal issues of the day, starting with the Federalist Papers. It's hard to believe that neglecting that tradition in favor of a cloistered academic existence in which legal scholars write only for each other could be a good thing. On the other hand, even the best legal blogs contain more chaff than wheat. And legal bloggers who offer mostly ill-considered opinions on every topic imaginable may bring disrepute to the legal academy. On the whole, I am inclined to be cautiously optimistic about the potential value of legal blogging. But then I enjoy blogging, so perhaps my judgment on these matters ought not be deferred to too readily.

Thomas Jefferson called the collection of essays we now know as the Federalist Papers “the best commentary on the principles of government, which ever was written.”¹ And if the judgment of history counts for anything, he may not have been too far off the mark. In colleges and universities all over the world, the Federalist Papers² have been read and discussed many times over, sometimes alone and sometimes in conjunction with the Anti-Federalist Papers.³ Somebody obviously thinks highly of them.

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1. Letter from Thomas Jefferson to James Madison (Nov. 18, 1788) (on file with the Library of Congress).

2. ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST (George W. Carey & James McClellan eds., Gideon 2001).

3. See THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS (David Wootton ed. 2003).

Part of the Federalist Papers' longevity is just luck. If the proposed Constitution had been rejected, it is unlikely that they would ever have been collected into a single volume. And if the Constitution had later failed, they would likely have sunk into obscurity. Insofar as they have had staying power, it is because the Constitution has had staying power. But luck was not the only factor working in the Federalist Papers' favor. If they didn't contain useful insights about the nature of man and the governments men create, they would have been forgotten years ago. The Constitution's success by no means guaranteed their fame.

When one is looking at a heavy leather-bound edition of the Federalist Papers, it's easy to lose sight of their humble origins. These essays didn't start off life with all that gold tooling. They were written for various newspapers in New York and handed out on street corners. No doubt more than one "original edition" had beer spilled or mustard smeared on it before the sun had set that evening. Most of the rest made it to the garbage heap by the end of the week. The authors, moreover, weren't grey-haired philosophers writing for the ages. They were lawyers—thirty-year-old Alexander Hamilton, thirty-six-year-old James Madison, and their "elder statesman" forty-two-year-old John Jay—with a short-term goal in mind: Get the proposed Constitution ratified in New York. Do it by responding to the Anti-Federalist arguments that seem to be getting the most traction on the street. And be quick about it, because, like it or not, minds are being made up every day, and it will be impossible to un-make many of those minds once they are made.⁴

Like most political tracts, the Federalist Papers occasionally mischaracterize the arguments of their opponents or make arguments that, upon reflection, few would find particularly convincing. But that is forgivable. The authors were working at a furious pace under a great deal of pressure. It's not surprising to find that some of the essays are better than others or that even the better essays are less than perfect.

What is surprising is how, despite these faults, the authors aimed for, and for the most part achieved, a level of sophistication that would be unimaginable in the mainstream media today. In among the saw mill advertisements and shipping news that filled the New York newspapers of the day were some remarkably learned and insightful essays that, among other things, distilled and applied for a popular audience much of the

4. *See id.*

contemporary and ancient learning on governmental structure. And they may well have turned the tide in favor of ratification.⁵

It's hard for a legal scholar not to get an idea in her head that one day, if the stars are properly aligned, she may be able to produce topical little essays with the combined virtues of the Federalist Papers (or even the Anti-Federalist Papers). By that, of course, I don't mean that I may be able to produce essays that persuade some future nation to adopt a grand constitutional charter. That might be setting my sights just a tad too high. But it would be nice to have the opportunity to write something short and informal. It would also be nice if the topic could be of immediate importance and if the commentary could be just a little bit insightful. And it would be especially nice if it could be widely read and consequential. To put it another way, it would be great to write the perfect legal blog—for in some sense, that's what Messrs. Hamilton, Jay, and Madison were doing. On their best days, some of my fellow legal scholars/bloggers have gotten reasonably close to the goal. And maybe I will too some day.

To understand why a legal scholar might wish to blog, one need only contrast the style of the Federalist Papers with that of modern legal scholarship, which for many years had been developing in precisely the opposite direction. Unlike the Federalist authors, modern legal scholars most often write long, ponderous law review articles whose connection to the legal and political issues of the day is decidedly indirect. Seldom does the work have direct or observable consequences. As a result, although the job of the legal scholar must surely be one of the most pleasurable occupations in the world, a feeling that one's work has been widely read and had consequences outside the ivory tower is not one of the more common pleasures it offers.

How did legal scholars get in that position? Our detachment from the issues of the day is largely intentional. As a law student writing for the *University of Chicago Law Review* twenty-something years ago, I was repeatedly advised to choose a topic that as few people as possible cared about. It was good advice. Attempting to write on a hot topic would risk preemption given the lengthy lead time necessary to write and edit a law review comment. If I had attempted to critique a pending case or a legislative bill, it would likely not be pending by the time the comment

5. The people of the City of New York apparently thought so. On July 23, 1788, Alexander Hamilton was honored by a celebratory parade that featured a twenty-seven-foot miniature frigate at full sail being pulled down Broadway by ten horses and dubbed the "Federal Ship *Hamilton*." It seems unlikely they would have done this for a man they thought had simply written a few interesting essays. See RON CHERNOW, *ALEXANDER HAMILTON* 268–69 (2004).

was published. A lot can happen to a hot issue to make it stone cold before a scholarly treatment of it can reach print.

Faculty members face similar constraints. In addition to the time spent writing their articles, the typical faculty member must factor in the time-consuming process of finding a law review willing to publish it. And although new technologies are changing things somewhat, sticking to issues with low public profiles is still the safest strategy when writing formal legal scholarship. As a result of these and other built-in restrictions, in recent years, the work of most legal scholars has had a very small audience—composed mainly of other legal scholars. Indeed, even fellow legal scholars aren't always a dependable audience. My colleague and fellow blogger Tom Smith reports that forty percent of law review articles are never cited by anyone—not even their own authors.⁶

The voice of legal scholarship has not always been quite so lonely. For most of the twentieth century, legal scholars typically wrote about the kinds of issues that judges and lawyers actually confronted in their professional lives. Because legal scholars had both the necessary time to take a long, sustained look at the issues and the detachment that comes from representing no one but themselves, they could be assured a significant, though not always large, audience outside the legal academy. Some legal scholars still do this sort of traditional legal scholarship.⁷ But somewhere in the course of the last generation or two, probably for both good and ill, the legal academy shifted its focus. Most of the glamorous scholarly work is no longer written to be of assistance to a professional audience. Instead, it has become increasingly abstract in nature. As a direct consequence, most judges and lawyers have lost interest, and the legal academy has turned inward on itself.

Not everyone has been pleased with this shift. In a 1992 law review article that was widely read by legal scholars, Judge Harry Edwards wrote:

I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools—especially the so-called “elite”

6. Thomas A. Smith, *The Web of Law* 22 (Spring 2005), available at http://ssrn.com/sol3/papers.cfm?abstract_id=642863.

7. Tax is an example of an area where traditional scholarship is still strong. Academics in the tax area tend to write articles that are useful to tax lawyers; tax lawyers in turn sometimes contribute to the academic tax literature.

ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.⁸

Others, most notably Judge Richard Posner, expressed “deep disagreements” with Edwards’s position.⁹ Posner pointed out that some of the new scholarship has indeed been consequential. As an example he pointed to the effect the law and economics literature has had on antitrust law. Sadly, however, after another fifteen years, Posner’s antitrust example, although an excellent one, remains the best example of how the new legal scholarship can have direct consequences on the law. Few would deny Edwards’s most basic observation—that legal scholarship has become more abstract and hence less accessible to the average practicing lawyer, judge, or legislator—or that it is difficult given those circumstances for the new scholarship to have direct consequences on the law. To be sure, it may have profound indirect consequences. But indirect consequences are both unpredictable and difficult to measure. As a result, they can be less satisfying to the author—at least if abstract legal scholarship is all the author ever writes.

Perhaps a more interesting question is why the shift occurred. Some of my colleagues in the legal academy have suggested that as more and more talented people have been attracted to the legal academy, they have found it more and more dissatisfying to address “little questions” that confront lawyers and judges, and more desirable to think about the “big questions” that we sometimes label legal theory. No doubt there are many reasons for the change, but I am more inclined to credit a different one: legal scholars found themselves edged out of the market by competition. Judges, assisted by an army of recently graduated law clerks, found that they could produce large numbers of essays that exhaustively analyze the issues that come before judges and lawyers using the traditional tools of the legal profession.¹⁰ These essays had an advantage over legal scholars’ work because they were part of authoritative court decisions. Lawyers felt obliged to read them. If legal scholars were to maintain their prestige they

8. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

9. Richard A. Posner, *The De-Professionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993).

10. Both the proportion of decisions that produced published opinions and the length of those opinions dramatically increased over the course of most of the twentieth century. As these opinions could be accessed through increasingly sophisticated research tools starting with Shepard’s citation service and West’s Digests and continuing through Lexis, Westlaw or the Internet, judges and lawyers had less reason to rely on the work of legal scholars, which did not carry with it the authority of a court decision.

would have to find a new angle, much as painters had to find a new, more abstract angle after the invention of photography.

Legal scholars did, of course, find a new angle—several new angles. They reinvented themselves—a privilege not everyone in every job category has. In addition to the “traditional legal scholar” model, other models of the ideal legal scholar were born—what I might call the “legal activist,” the “legal scientist,” and the “legal philosopher.” And while few flesh and blood legal scholars precisely personify one and only one of these ideals, most legal scholars can be fairly described as predominantly one or a mix of two. These new ideals started legal scholarship down the road toward increasingly abstract scholarship for a small academic audience. That in turn ultimately led to a reaction under which some contemporary legal scholars have turned to blogging as a way of reconnecting with the world outside the academy.

The “legal activist” was the first new model to emerge in the post-traditional era. By that term, I mean the model of the law professor who devotes his talents to achieving justice in the halls of power—the “action figure” law professor. The true legal activist litigates cases on behalf of causes he deems worthy. Alternatively, he may put his primary energies into monitoring and lobbying legislatures and administrative agencies on behalf of such causes. Legal activists are in effect crusaders for justice—an image that went a long way toward injecting some life into the otherwise tired image of the law professor—at least when the model first emerged.

One of the advantages of the activist model is that it exposes law students to faculty members who are actually engaged in legal practice—albeit a kind of legal practice that differs enormously from the typical practice in ways that are subtle and not-so-subtle.¹¹ When law students can assist in such litigation (as they do in a clinical setting) the potential for learning is obvious—provided the work to be done is neither too difficult nor too easy for beginning lawyers. The primary risk in this setting is that students will learn to mistake uninformed passion for legal judgment and skill. This is a danger that can be minimized by talented and thoughtful legal activists, although, unfortunately, not all legal activists have done so.

Whatever one thinks of the legal activist model, however, there has never been much chance that it would take over the legal academy. Law

11. In an earlier day, some law professors were also practicing lawyers and not legal scholars in that they did not write scholarly works of any kind. Today, some law students are exposed to lawyers with typical legal practices mainly through adjunct faculty members, who unfortunately and probably unavoidably tend not to be well integrated into the life of the law school.

schools simply can't finance it. The number of students who can participate in litigation clinics is quite limited; the level of supervision required is quite extensive. If a significant part of the law school curriculum were taught through clinics, it would likely bankrupt all but the wealthiest law schools. The alternative—having legal activists teach the curriculum in a classroom setting—is no more appealing. Classroom teaching is usually inconsistent with the demands of legal activism; litigation in particular is more easily conducted by full-time lawyers working in the hierarchical structure of the law firm. Even when it can be made to work, it's not clear why law schools should be interested in heavily subsidizing legal activities without a teaching component.

As a result, most law schools have only a limited number of legal activists. Moreover, these legal activists are marginal players in the production of legal scholarship. They write briefs and occasionally testify before legislatures, boards, and administrative agencies, but they don't write law review articles, treatises, or books.¹² Legal scholarship for the most part has to be left to others.

The new legal scholars are therefore primarily the “legal scientist” and the “legal philosopher.” Together those two have dominated the elite law reviews of the last generation. Along with the traditional legal scholar, they also teach the bulk of the law school curriculum. Unlike either the traditional legal scholar or the legal activist, little of what they write employs the traditional lawyer's tools of case analysis and statutory analysis.¹³ Seldom does a close reading of a case or statute appear in their formal legal scholarship. Instead, the legal scientist studies law and legal institutions using the methods of the behavioral sciences—originally mostly economics, but more recently political science, psychology, and sociology. The legal philosopher uses the traditional tools of the philosopher. For example, a traditional legal scholar might ask the question, “Under what circumstances will a court, sitting in equity, impose a constructive trust?” But a legal scientist might ask, “Is the imposition of

12. As a result, the slow speed at which legal scholarship is produced and published is not a problem for legal activists. Most of the time, legal activists speak directly to the courts and other legal institutions, not to other legal scholars, the legal professions, or the general public. When they do occasionally publish in law reviews, it is often because they have already written a brief that was read only by the judge and the attorneys working on the litigation, and they want to convert it to a law review article to ensure that it is preserved somewhere.

13. The one glamorous area of the law that is in the traditional legal scholarship mode is constitutional law, especially when it is done from an originalist perspective rather than the once-fashionable straight public policy perspective. But unlike many fields, constitutional law has few specialists outside the legal academy. As a result, although many lawyers are interested in the subject, few read legal scholarship in the area.

a constructive trust consistent with the economic goal of efficiency?” And a question for the legal philosopher might be, “Is the economist’s goal of efficiency an appropriate one?”

Both approaches are very different from the practice of law. Scientists and philosophers are “real” academics whose methods are essentially similar to the methods of economists, political scientists, psychologists, sociologists, and philosophers in an arts and sciences school. They happen to take law and legal institutions as the object of their study (although particular legal scientists and legal philosophers may be trained as lawyers as well). As academics, they are perfectionists. Scientists seek, through the application of the scientific method, to slowly but steadily build a body of reliable truth. As time goes by, with luck, the legal scientists hope that progress will be made as more hypotheses are shown to be sufficiently reliable to apply the term “science” to them. But scientists never claim that everything is within the immediate reach of science, and when they are tempted to, philosophers quickly inform them of their error. They must build a scientific foundation first. Just as scientists can’t know everything about what lies at the ocean depths or the far reaches of the galaxy until they in some sense “get there” (and even then there will be ambiguities and disagreements), legal scientists can’t provide the answers to all questions of law and public policy—even the purely factual ones. Further progress must be made—and many questions will likely remain unanswered forever. In the final analysis, there is no final analysis.

Lawyers often have no such luxury. Their work is not done in cloistered ivory towers. It is done in the hustle and bustle of downtowns, small towns, and neighborhoods. As judges and litigators, they must resolve disputes in a timely manner. As legislators and lobbyists, they must try to provide a statutory and regulatory framework that will promote the general welfare in the here and now. In performing all these tasks, they will forever be acting on less than full information. It’s up to them to somehow fill the gaps. Indeed, gap filling is a significant part of their stock in trade.

If at the end of a criminal trial, the jurors can’t in good faith claim to be “certain” of the defendant’s guilt, the gap may be filled with a rule requiring proof beyond a reasonable doubt. If at the end of oral arguments on a civil appeal, the court is still not certain whether justice is better served by adopting one policy or the other, the gap may be filled with the doctrine of *stare decisis*, which directs the court to follow past practices and traditions. Lawyers have a style of analysis that makes tough questions manageable and promotes at least a modicum of closure.

That doesn't mean that scientists and philosophers should not be teaching law students. Of course they should. A good lawyer can and should draw on multiple sources, and an increasingly scientific world is likely to increasingly draw upon science in the formulation of law and public policy. As academic institutions, law schools should be at the forefront of these efforts. At the same time, it is important to recall that the skills employed by scientists and philosophers are not completely congruent with the set of skills that lawyers must master and display. Lawyers must be able to argue persuasively to a general audience (as well as a broad professional audience). Lawyers must know when to improvise—to use available evidence and learning even when it is incomplete—and when not to. And they must have the quality that Dean Anthony Kronman once called “practical wisdom”—the intuitive understanding of human conduct that comes from having seen and pondered an awful lot of it.¹⁴ Their teachers, or at least some of them, should hone and display these skills too.

How can these lawyerly skills be displayed (and honed) by legal scholars? For reasons I've already discussed, it's not clear that it would be wise to encourage large numbers of legal scholars to be part-time litigators. Perhaps instead the gap can be filled (however imperfectly) by providing public commentary on legal and policy issues.

That leads me to the other possible model (or partial model) for the law professor—the “public intellectual.” By that, I mean the public commentator on current issues and events who attempts to bring academic thinking to bear on those issues and events. In some ways this is an ideal role for legal scholars. A large portion of the issues that command the public's attention involve law and legal institutions, so legal scholars have expertise. As lawyers, many legal scholars are adept at speaking or writing about contemporary issues of law and public policy with an eye toward clarity and persuasion.¹⁵ But unlike practicing lawyers, they have the time to devote to public commentary—at least if their academic institutions agree that public commentary is a useful way for them to spend their time.

14. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 53–108 (1995). See Gail Heriot, *Songs of Experience*, 81 VA. L. REV. 1721 (1995) (reviewing *The Lost Lawyer*).

15. Contrary to popular belief, lawyers are not the world's worst writers. The job of a litigator is to persuade judge and jury of the rightness of his client's position. That requires considerable skill with language. While lawyers who represent clients in transactions are a different literary breed, whose goal is not to persuade but to remove all ambiguity from the mind of the careful reader, they too must write clearly and skillfully. But they needn't be fun to read (and ordinarily are not).

And unlike practicing lawyers, many can also bring to bear on the issues their expertise as legal scientists and legal philosophers.

Until recently, the “public intellectual” simply was not a viable role for legal scholars. In large part this was because the existing media did not fit in well with the ideal. Large numbers of law professors appeared on television news from time to time when a legal news story appeared. But only the least self-aware imagined that their thirty-second sound bites had any implications beyond the filling of air time. It’s simply not possible to say something worthwhile in that amount of time.

Radio is only slightly better. With that medium, more time can be devoted to discussions of law and public policy. But no one imagines that Messrs. Hamilton, Jay, and Madison would be invited onto a radio show today in their role as public intellectuals to hold forth on the proposed Constitution in anything like the length, breadth, and depth that they did in the New York newspapers. Radio is a medium with a short attention span. If you’re going to make a point, you need to make it between the time your listener climbs into her car in the morning and arrives at Starbucks two and one-half minutes later. You may get a second opportunity during the trip between Starbucks and the Home Depot or you may not, because if you bore her for even a single second, she’ll punch the button for another station. At that point, you’re radio history.

Newspapers that publish op-eds written by law professors are another rung up. But the odds that an American newspaper would publish something that takes advantage of a law professor’s expertise are low, and the odds it would publish something with the level of sophistication of the Federalist Papers are very low indeed. Evidently, a lot has changed in 219 years. The opportunities legal scholars have to write interesting pieces for newspapers and general circulation magazines are few—too few for a significant number of legal scholars to act as public intellectuals through that medium.

But the blogosphere is different. When it came into being, legal scholars quickly became some of the most successful practitioners of the gentle art of blogging. Hundreds of them are bloggers.¹⁶ Of the top one hundred blogs anywhere in the world, as listed by Technorati, two are wholly or partly authored by American law professors.¹⁷ We are a blog-happy group.¹⁸

16. *See, e.g.*, Cynthia Cotts, The Law Professor as Public Intellectual, The American Lawyer on the Web, <http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1148634332208>; Law Professor Blogs, <http://www.lawprofessorblogs.com> (last visited Nov. 12, 2006).

17. The top blog, as measured by unique links in the last six months, was in Chinese. Instapundit

In the blogosphere, legal scholars can comment on pending cases or legislation without fear that the issue will become stale before anyone gets a chance to read it. They have no reason to fear that they will never have another crack at the issue, so they feel no obligation to go on at excruciating length. And they can reach a large audience—at least relative to the number they would reach with their formal legal scholarship and sometimes even relative to the number they could reach in a newspaper. Unlike writers for a newspaper, however, they can feel free to cite David Hume or Karl Llewellyn or write about game theory. They might even cite to the Federalist Papers.

What purpose does it serve? Some would argue next to none—that blogging is just one more self-indulgence by law professors. And maybe the naysayers are more right than I would like to concede.¹⁹ The problem is that blogging is fun. And since various rules, regulations, and practices make the job of tenured law professor one of the best protected sinecures in the nation, it would be unwise to take as gospel my (very tentatively held) contrary opinion that blogging is a useful activity for legal scholars.²⁰ I may be just a bit biased.

was number fifteen, and the Volokh Conspiracy was number one hundred as of June 29, 2006. Technorati, <http://www.technorati.com/pop/blogs/> (last visited June 29, 2006).

18. Perhaps not all are using the medium to reach a general audience, so perhaps not all are examples of the law professor as “public intellectual.” For some law professors, the blog is an extension of more traditional models of the law professor. My colleague Shaun Martin, for example, is the author of California Appellate Blog—very much in the traditional style of legal scholarship in everything but its casual tone. Shaun’s blog performs a service for practicing lawyers and judges by alerting them to new decisions by the California Courts of Appeal. Others—like Legal Theory Blog written by my former colleague Larry Solum—work within a more modern conception of legal scholarship. It alerts law professors and other scholars who study the law and legal institutions of recent works of theoretical scholarship. It is unclear to me how many readers are non-scholars.

The more free-wheeling academic blogs that aim at a more general audience come closer to what I mean by public commentary on current issues and events. Included among these would be the blog I share with some of my USD colleagues. Our blog purports to provide the general reader with “thoughts from San Diego on law, politics and culture.” And that’s pretty much what we do. Very little is off limits. At our best, we try to furnish a law professor’s perspective on newsworthy events and issues. (At our worst, we are guilty of contemplating our own navels and the navels of our nearest and dearest.) It’s done in the extremely informal style of the blogosphere.

19. But the fact that many legal scholars enjoy blogging is not in itself proof of its lack of productive value. Many people enjoy their jobs.

20. To begin with, the law professor is tenured. The law school’s (or indeed anyone’s) ability to influence his conduct is thus very limited. Moreover, the law school cannot choose to forgo the practice of tenuring faculty members. The ABA Council on Legal Education, in what may be another example of “agency capture,” in this case by faculty members, requires tenure (and other various benefits) for full-time faculty. No law school can afford to go without ABA accreditation. Federal funding (including federally subsidized student loan programs) are contingent on ABA accreditation as is the right of law school graduates to sit for almost all state bar examinations.

Others take a view of blogging that is only slightly more generous than these naysayers'. They argue that blogging takes the place of faculty lounge chit-chat, which in the age of the internet takes place less often, since many law professors work from home now that the need to stick close to the law library is diminished. Under this view, some very useful things may be accomplished—ideas may be fleshed out in conversation, bad ideas shot down, and good ideas encouraged—but blogger chit-chat, like faculty lounge chit-chat, must ultimately be judged by fruit that comes in the shape of more and better formal legal scholarship. The fact that a blogger's work may be viewed on the Internet by anyone at any time is not so much viewed as a virtue of the medium as it is unfathomable. Why would anyone other than a working scholar want to read about such half-baked ideas?

I am inclined instead to the view that blogging is valuable for its own sake. It provides a conduit by which ideas from the legal academy can be added to the usual public discourse. But it's important to note that conduit works both ways. By allowing the real world issues into the legal academy, it allows scholars to connect with that world in a way they otherwise might not. It thus reminds them that they are not just scholars, but lawyers. When done well, it can make scholars public intellectuals in the best sense of that term.

Few would argue that all blog entries by legal scholars (or even most of them) are high quality. Overwhelmingly they are not. Lots of chaff appears to be inherent in the medium. But that does not distinguish blogs from more traditional forms of writing by law professors. As Judge Posner has noted, in the context of legal scholarship, "[o]ut of 6000 eggs laid by a female salmon and fertilized by a male, on average only two salmon are born who live to adulthood."²¹ Yet it would be silly to suggest that the endeavor is not worth it for the salmon. A low rate of success for law review articles does not necessarily mean that more formal legal scholarship should not be undertaken. It should not be regarded as an argument against legal blogging either.

It's true that some legal blog entries are remarkably trivial. Legal scholars comment on the cute things their children said at the breakfast table or the tummy ache they got after eating too much dim sum. Hardly anyone is foolish enough to regard them all as insightful legal commentary. But it's important to judge them for what they are intended to be and not for something else. Good trial attorneys (and good teachers)

21. Posner, *supra* note 9, at 1928.

know that if you want to influence people, you've got to tell a story now and then. Bloggers know it too. Some of these stories really are insightful. But bloggers also know that they must fill a blank page now and then, so not every story will be infused with deep meaning; many are just efforts to be entertaining. The most trivial stories drive some readers crazy; indeed, sometimes they drive me crazy. But when done well, merely entertaining stories probably do keep some readers coming back (and if they don't, legal bloggers will probably move away from them over time).

Apart from such filler, is legal blogging scholarship? Well, that strikes me as no more useful a question than that perennial conversation stopper, "Yes, but is it art?" It doesn't matter whether it gets called "scholarship" or "Fred." What matters is whether it is a sufficiently worthwhile activity for legal scholars that law schools (and the community that supports law schools) ought to encourage their participation generally.

I am inclined to feel that it is worth at least some of our time—that it both provides useful commentary on pressing contemporary legal issues of a kind that would be available nowhere else and helps to prevent hyper-scholasticism in the legal academy. But I readily admit that the jury is still out over whether blogging will sustain the interest of both legal scholars and their readers over time.²² I hope it does. I hope that law schools give it

22. It is not that I have significant doubts about the value of the blogosphere as a whole. To the contrary, it seems to me that it has already proven its value many times over. It has the significant structural downside of reinforcing readers' own political viewpoints (and hence of fostering extremism among those with that tendency), since every reader can always find and read blogs that he or she already agrees with. But it also possesses at least three significant virtues.

First, coming as it did after a long period of mainstream media monopoly, during which much of the media had become fat and lazy, the blogosphere had its work cut out for it. Call it good timing if you will, but the fact is that bloggers are extremely effective critics of the media. Dan Rather's scalp is unlikely to be their last.

Its second virtue is its unique pajama brigade, which I believe is an inherent virtue of the technology. Most bloggers—and there are many—are dilettantes. They have day jobs that frequently require a substantial level of expertise. Individually they may be just a computer analyst who knows a lot about computer typography or some corporate lawyer who knows a lot about the Sarbanes-Oxley Act. Together their expertise outdistances the combined expertise of the mainstream media by orders of magnitude. A journalist friend of mine once told me that he is an inch deep and a mile wide on every subject and that's what he's paid to be. That is not the profile of the typical blogger. The best, like the best journalists, have broad knowledge and interests, but they also have a deep end, an area in which they really do know something and know it well.

I believe that the third virtue of the blogosphere is also inherent, but it's a bit more difficult to explain why. The blogosphere appears to be specially suited to point out when the emperor has no clothes. I say this because I believe I've seen it happen more than once.

The Harriet Miers nomination, and the reaction to it by conservative legal bloggers, is perhaps my best example. Whatever one's political persuasion, that reaction is worth examining. In the moments immediately after the nomination, a number of prominent conservative lawyers effusively praised the President's choice. But evidently quite a few conservative lawyers had doubts about the choice—

enough encouragement to make that possible. Most of all I hope that my fellow legal scholars will remember Messrs. Hamilton, Jay, and Madison and understand that not every insightful legal writing must be long, ponderous, and unreadable to the general public.

doubts they might have been willing to keep to themselves had they not been aware that others shared those doubts. With the blogosphere, they were discovered quickly.

Part of the explanation is the sheer numbers involved. There's usually someone in every crowd who is willing to speak his mind. But it's not just that. At least two more things may be at work here. Bloggers get used to sharing their thoughts—even tentatively held thoughts. In a world without a blogosphere, those same human beings might have been asked to comment on radio or television on the Miers nomination and might have declined to do so, or done so and pulled their punches. The blogosphere emboldens this sort of person. They know they're supposed to say something. Why not say what they're really thinking? Combine that effect with the important fact that as dilettantes they really have less to lose if they write a blog entry that is later judged too hot-headed, and suddenly you're dealing with a very frank medium.